LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 30 1968
JOHN F. DAVIS, CLERK

No. 588

In the Supreme Court of the United States

OCTOBER TERM, 1968

HLH PRODUCTS, DIVISION OF HUNT OIL CO.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice, Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
ROBERT A. GIANKARI,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:

Crawford Manufacturing Co. v. *National Labor Relations Board*, 386 F. 2d 367, certiorari denied, 390 U.S. 1028	10
Editorial "El Imparcial," Inc. v. *National Labor Relations Board*, 278 F. 2d 184	9
Franks Bros. Co. v. *National Labor Relations Board*, 321 U.S. 702	9
Holmes, D. H. v. *National Labor Relations Board*, 179 F. 2d 876	9
Irving Air Chute Co. v. *National Labor Relations Board*, 350 F. 2d 176	10
Local No. 152, Teamsters Union v. *National Labor Relations Board*, 343 F. 2d 307	9
Local 1424 v. *National Labor Relations Board (Bryan Mfg. Co.)*, 362 U.S. 411	8
National Labor Relations Board v. *Caldarera*, 209 F. 2d 265	9
National Labor Relations Board v. *Delight Bakery Inc.*, 353 F. 2d 344	9
National Labor Relations Board v. *Flomatic Corp.*, 347 F. 2d 74	10
National Labor Relations Board v. *S.S. Logan Packing Co.*, 386 F. 2d 562	10
National Labor Relations Board v. *River Togs, Inc.*, 382 F. 2d 198	10

324-011—68

Cases—Continued

	Page
Penney Co., J. C. v. *National Labor Relations Board*, 384 F. 2d 479	9
Peoples Service Drug Stores, Inc. v. *National Labor Relations Board*, 375 F. 2d 551	10
Piasecki Aircraft Corp. v. *National Labor Relations Board*, 280 F. 2d 557, certiorari denied, 364 U.S. 933	9
Summit Mining Corp. v. *National Labor Relations Board*, 260 F. 2d 894	9
United Steelworkers of America (Northwest Engineering Co.) v. *National Labor Relations Board*, 376 F. 2d 770, certiorari denied, 389 U.S. 932	9
Wausau Steel Corp. v. *National Labor Relations Board*, 377 F. 2d 369	9
Statute:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 8(a)(1)	6, 7, 9, 10
Section 8(a)(3)	6, 7, 9
Section 8(a)(5)	6, 7, 8, 9
Section 10(b)	8
Section 10(e)	8

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 588

HLH PRODUCTS, DIVISION OF HUNT OIL CO.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21a–27a) is reported at 396 F. 2d 270. The Board's decision (19a–20a, 1a–14a) is reported at 164 NLRB No. 61.

JURISDICTION

The opinion of the court of appeals was issued on June 6, 1968 (Pet. App. 21a). A petition for rehearing was denied, and the decree was entered, on July 8, 1968 (Pet. 1–2). The petition for a writ of certiorari was filed on September 30, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board's finding that the employer refused to recall certain employees because of their union activity was invalid because the Board considered, as background evidence, matters occurring prior to the six-month limitation period in Section 10(b) of the National Labor Relations Act.

2. Whether the Board properly exercised its remedial authority in ordering the employer to bargain with the certified union upon request.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to the petition (Pet. App. 28a).

STATEMENT

Petitioner is engaged in processing and canning food products at plants in several states, including one at Muncie, Indiana (Pet. App. 1a; J.A. 40–41).[1] In September 1962, petitioner concluded an agreement with the Union,[2] which had been certified by the Board, covering the Muncie plant (Pet. App. 2a; J.A. 367–372, 40).

About the time the agreement expired on March 31, 1964 (Pet. App. 2a; J.A. 376), a Company representative, William Butterfield, and Foreman Jim Reyn-

[1] "J.A." refers to the joint appendix to the briefs in the court below, copies of which have been filed with this Court.

[2] Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

olds arranged for and held a meeting with employees to consider "voting [the Union] out" (Pet. App. 2a; J.A. 44, 69–72, 75, 89–90, 114). Thereafter, Reynolds drove an employee, in a Company car, to the Board's Regional office for the purpose of filing a decertification petition (Pet. App. 2a; J.A. 71). During the subsequent election campaign, Butterfield visited numerous employees at their homes, telling them that petitioner would close the plant if the Union won the election (Pet. App. 2a–3a; J.A. 214–215, 225, 125, 120, 131, 135, 145, 162). The day before the election, production was halted at the plant and Butterfield told assembled employees that Company President H. L. Hunt would close the plant within six months or a year if the Union won the election (Pet. App. 3a; J.A. 215–216, 226–227).

The Union won the election by a vote of 65–25 and was recertified as the bargaining agent on July 27, 1964 (Pet. App. 3a; J.A. 361–364, 31–32). However, after a period of bargaining, the parties were unable to reach an agreement (Pet. App. 3a; J.A. 247, 253–257, 262–263).

On February 4, 1965, petitioner posted a notice at the Muncie plant stating that it was ceasing operations there (Pet. App. 4a; J.A. 33, 52, 60–61, 365). Plant Manager Peter Lux and Foreman Albert Glass told employee Russell Pollard that the plant was being shut down because of the Union (Pet. App. 4a; J.A. 96–97). No notices of termination were sent to employees, however, and a crew of five maintenance, office, and quality-control employees continued to work (Pet. App. 4a; J.A. 47–48, 127).

On March 20, petitioner recalled its farm manager, who had been laid off two weeks before, in order to prepare for the 1965 tomato-packing season; shortly thereafter, he began purchasing tomato crops and making arrangements for their harvesting (Pet. App. 4a; J.A. 283–285). About May 15, the maintenance employees began preparing the plant for the tomato pack (Pet. App. 4a; J.A. 277), and, on June 3, John Volz, the new plant manager, informed petitioner's senior legal officer of plans to recruit labor for the tomato pack (J.A. 401–403). In previous years, employees had annually been laid off for a period of six to eight weeks because of the changeover from potato packing to tomato packing (J.A. 41, 48–49, 59, 126), and petitioner had recalled laid-off employees by post card or telephone (Pet. App. 4a; J.A. 54, 119, 123, 132, 145). On this occasion, however, the Company decided to recruit employees through the Indiana Employment Security Division. The Company supplied the Division with a list of employees and their addresses compiled from its records (Pet. App. 4a; J.A. 279, 306). The Division sent letters to those employees who lived in Indiana, advising them that the Company needed workers to process tomatoes and inviting them and "your friends" to register for work with the Division on July 22 and 23, 1965 (Pet. App. 4a; J.A. 387, 291, 296). The Division also advertised for cannery workers generally by newspaper and radio (Pet. App. 4a; J.A. 54, 44, 291, 296–297).

On July 23, the Union wrote petitioner, stating that it had received information that the Muncie

plant would be reopened and requesting that petitioner recall old employees "in their seniority order" and "meet with our representatives to negotiate a new contract" (Pet. App. 5a; J.A. 376). Petitioner replied on July 27, stating that operations at the plant would probably be "temporary and seasonal," that its contract with the Union had expired and that it believed "former employees of our Muncie plant have better employment than we can provide" (Pet. App. 5a; J.A. 373). On August 2, the Union wrote petitioner, claiming the jobs at the reopened plant and asking for further negotiations; petitioner's reply restated the position expressed in its prior letter (Pet. App. 5a; J.A. 377–379).

The Employment Division took the names of those who responded to the letters and advertisements and, when petitioner asked for workers, the Division selected registered persons at random and sent them to the Company (Pet. App. 4a; J.A. 292–294, 297–298, 300–301). Some old employees were not notified by the Division and others who were notified and signed up were not referred (J.A. 291–292, 123, 144, 133). The persons referred were required to fill out Company application forms and were interviewed (Pet. App. 5a–6a; J.A. 52–55, 317–318). Petitioner interviewed some 700 persons and hired about 600, some of whom worked only a day or less (Pet. App. 5a–6a; J.A. 52–55, 317–318, 53–54). Petitioner also hired "quite a few" people "off the street" (J.A. 327). Neither petitioner nor the Employment Division gave preference to the old employees (Pet. App. 4a, 8a; J.A. 300–301, 317–318).

During the period from late July to September 1965, when petitioner was restaffing its plant, a number of old employees went to the plant and asked for work, but petitioner refused to rehire them (Pet. App. 6a–7a; J.A. 79–80, 84–85, 196–197, 98–99, 164–168, 112–113, 134–135, 142–144, 138, 123–124, 232). Company officials told one employee that the plant would operate if the Union was kept quiet, but that it would be closed if "they got the Union started back up again" (Pet. App. 6a, n. 10; J.A. 79–80, 84–85); they questioned another employee about his union membership and told him, "we just don't want union members in the plant" (Pet. App. 6a; J.A. 98–99). Similar statements were made to other applicants (Pet. App. 6a–7a; J.A. 164–165, 196–197).

On November 2, 1965, employee Audrey Rutledge filed charges with the Board alleging that petitioner's refusal to recall old employees violated Section 8(a)(1) and (3) of the Act (J.A. 6). A complaint issued on this charge (J.A. 8). On April 19, 1966, Mrs. Rutledge filed another charge alleging, *inter alia,* that petitioner refused to bargain with the Union in violation of Section 8(a)(5) (J.A. 20–22). An amended complaint covering this charge was issued (J.A. 22–25).

The Board, affirming the Trial Examiner, found that the Company failed to recall and reemploy the workers employed before the shutdown of February 2, 1965, because it knew that most of them were union supporters and it wanted to keep the Union out of the plant, and held that such failure violated Section

8(a)(1) and (3) of the Act (Pet. App. 9a, 13a). The Board further held that, since the Company's conduct in restaffing its plant "made clear that it sought to avoid its bargaining obligation" to the certified Union, the Company thereby also refused to bargain in violation of Section 8(a)(5) (Pet. App. 19a–20a, n. 1).[3] The Board ordered petitioner to cease and desist from the unfair labor practices found; to reinstate the employees discriminated against and pay them lost wages; and to bargain with the Union upon request (Pet. App. 14a–18a). The Board found that a bargaining order was necessary, even without the Section 8(a)(5) finding, since the Company's violation of Section 8(a)(1) and (3) "clearly evinces a rejection of its duty to bargain collectively" (Pet. App. 20a, n. 1).

The court of appeals held that the Board's findings were supported by substantial evidence and enforced the Board's order (Pet. App. 21a–26a).[4] The court rested its enforcement of the bargaining order upon the Board's alternative finding, *i.e.*, that the order was appropriate to remedy the Company's violations of Section 8(a)(1) and (3) of the Act (Pet. App. 25a).

ARGUMENT

1. Petitioner contends that the Board's finding of a violation was based on events occuring prior to the

[3] The Board also found that petitioner had violated Section 8(a)(1) of the Act by coercively interrogating and threatening individual employees (Pet. App. 8a–9a).

[4] Judge Knoch would not have enforced the bargaining order (Pet. App. 26a–27a).

six-months limitations period in Section 10(b) of the Act.[5] This contention is barred by Section 10(e) of the Act,[6] since petitioner did not urge it before the Board.[7]

In any event, the Board complied with the standard which this Court has established, *viz.*, that pre-limitations "events may be utilized to shed light on the true character of matters occurring within the limitations period," but "conduct occurring within the limitations period can [not] be charged to be [unlawful] only through reliance on an earlier unfair labor practice." *Local 1424* v. *National Labor Relations Board* (*Bryan Mfg. Co.*), 362 U.S. 411, 416–417. The Board considered pre-limitations events in the instant case only for the limited purpose of providing background (Pet. App. 9a), and not to "revive a legally defunct unfair labor practice" (*ibid.*). The substance of the violation found by the Board, the reopening and the restaffing of the Muncie plant, occurred dur-

[5] In relevant part, Section 10(b) provides that "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *."

[6] In relevant part, Section 10(e) provides that: "No objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

[7] Petitioner urged the contention for the first time in its brief in the court below. Before the Board, petitioner merely urged that the Examiner's Section 8(a)(5) finding was barred by Section 10(b); the Board found it unnecessary to resolve the question by adopting a different theory of the 8(a)(5) violation (Pet. App. 19a, n. 1).

ing the six-month period prior to the filing of the relevant charge on November 2, 1965. The Board's opinion relied principally upon events occurring within the limitations period (Pet. App. 5a–8a).

2. The court also properly upheld the order directing the Company to bargain with the Union. It is well settled that such an order is an appropriate remedy for a violation of the duty to bargain imposed by Section 8(a)(5) of the Act. See, *e.g., Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702. It is also settled that a bargaining order may be appropriate to remedy violations of Sections 8(a)(1) or 8(a)(3), where by those violations the employer has sought to avoid its bargaining obligation.[8] Here, as the Board found, the Company's discriminatory restaffing of a plant whose employees were represented by a certified bargaining agent constituted a "flagrant" violation of the Act, and evidenced a clear

[8] *D. H. Holmes* v. *National Labor Relations Board*, 179 F. 2d 876, 879–880 (C.A. 5); *National Labor Relations Board* v. *Caldarera*, 209 F. 2d 265, 268–269 (C.A. 8); *Summit Mining Corp.* v. *National Labor Relations Board*, 260 F. 2d 894, 900 (C.A. 3); *Editorial "El Imparcial," Inc.* v. *National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1); *Piasecki Aircraft Corp.* v. *National Labor Relations Board*, 280 F. 2d 575, 591–592 (C.A. 3), certiorari denied, 364 U.S. 933; *National Labor Relations Board* v. *Delight Bakery Inc.*, 353 F. 2d 344, 346–347 (C.A. 6); *Wausau Steel Corp.* v. *National Labor Relations Board*, 377 F. 2d 369, 373–374 (C.A. 7); *J. C. Penney Co.* v. *National Labor Relations Board*, 384 F. 2d 479, 486 (C.A. 10); *United Steelworkers of America (Northwest Engineering Co.)* v. *National Labor Relations Board*, 376 F. 2d 770, 772–773 (C.A. D.C.), certiorari denied, 389 U.S. 932; *Local No. 152, Teamsters Union* v. *National Labor Relations Board*, 343 F. 2d 307, 309 (C.A. D.C.).

"rejection of its duty to bargain collectively" (Pet. App. 20a, n. 1).

The authorities cited by petitioner, in which courts of appeals have refused to enforce bargaining orders (Pet. 16–18), are distinguishable on their facts and thus do not present a conflict. In none of the cited cases were the unfair labor practices as destructive of the principle of collective bargaining as those found here. *National Labor Relations Board* v. *Flomatic Corp.*, 347 F. 2d 74 (C.A. 2), involved only a "borderline, unaggravated § 8(a)(1) violation standing alone" (*id.* at 79), or, as the same court later termed it, "only a minimal Section 8(a)(1) violation." *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F. 2d 176, 182 (C.A. 2). In *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198 (C.A. 2), and *Peoples Service Drug Stores, Inc.* v. *National Labor Relations Board*, 375 F. 2d 551 (C.A. 6), the Section 8(a)(1) violations, although more substantial, did not, as here, disrupt an established bargaining relationship.[9]

[9] In *Crawford Manufacturing Co.* v. *National Labor Relations Board*, 386 F. 2d 367, 372 (C.A. 4), certiorari denied, 390 U.S. 1028, and *National Labor Relations Board* v. *S. S. Logan Packing Co.*, 386 F. 2d 562, 568 (C.A. 4), the unions involved sought to establish majority status on the basis of authorization cards, but the Fourth Circuit held that the cards were insufficient for that purpose; there was thus no basis for a bargaining order. The Union here twice had its representative status established by a Board election.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

ROBERT A. GIANNASI,
Attorney,
National Labor Relations Board.

OCTOBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968